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No. 15-1189

IN THE

Supreme Court of the United States

IMPRESSION PRODUCTS, INC.,

Petitioner,

v.

LEXMARK INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF PUBLIC KNOWLEDGE, THE ELECTRONIC FRONTIER FOUNDATION, AND THE R STREET INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

According to the patent exhaustion doctrine, once a patentee sells an article embodying the patented invention, "the patentee may not thereafter, by virtue of his patent, control the use or disposition of the article." *United States v. Univis Lens Co.*, 316 U.S. 241, 250 (1942). Yet the Court of Appeals approved of two mechanisms by which a patentee may sell a patented article and yet still control use or disposition of that article. The questions presented are whether those mechanisms are tenable under the exhaustion doctrine. Specifically:

1. Whether a "conditional sale" that transfers title to the patented item while specifying post-sale restrictions on the article's use or resale avoids application of the patent exhaustion doctrine and therefor permits the enforcement of such post-sale restrictions through the patent law's infringement remedy.

2. Whether, in light of this Court's holding in *Kirtsaeng v. John Wiley & Sons, Inc.* that the common law doctrine barring restraints on alienation that is the basis of the exhaustion doctrine "makes no geographical distinctions," 133 S. Ct. 1351, 1363 (2013), a sale of a patented article—authorized by the U.S. patentee—that takes place outside of the United States exhausts the U.S. patent rights in that article.

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are organizations that advocate for balanced intellectual property law that preserves the rights of the public. The present case relates specifically to consumer rights in ownership of property, and each organization has a strong interest in the correct development of patent law in this area.

Public Knowledge is a non-profit organization dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new, emerging technologies.

The Electronic Frontier Foundation is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 26,000 dues-paying members have a strong interest in helping the courts and policy-makers strike the appropriate balance between intellectual property and the public interest.

The R Street Institute is a non-profit, non-partisan public-policy research organization. R Street's mission

[1]Pursuant to Supreme Court Rule 37.2(a), all parties recieved appropriate notice of the filing of this brief. Respondent consented to the filing of this brief; Petitioners provided blanket consent. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support Internet economic growth and individual liberty. R Street's particular focus on Internet law and policy is one of offering research and analysis that show the advantages of a more market-oriented society and of more effective, more efficient laws and regulations that protect freedom of expression and privacy.

SUMMARY OF ARGUMENT

Though this case arrives before this Court in the trappings of intellectual property law, it actually deals with a much more fundamental type of property: consumer rights in personal objects, bought and sold in commerce. Such rights have traditionally been jealously guarded and defended.

Yet in affirming two exceptions to the doctrine of patent exhaustion, the Court of Appeals sustained two wide loopholes to those traditional notions of ownership. These loopholes, invented solely by the Federal Circuit, effectively allow any patent-owning seller of goods to destroy consumer expectations in property ownership, by permitting the seller to control use or disposition of physical goods sold and to wield the hammer of patent law to enforce those restraints.

1. The idea that patent law permits sellers of goods to dictate how downstream purchasers may use or resell their possessions stands in stark contrast to every other analogous doctrine. Centuries-old common law holds that ownership of property, especially personal property, may not be restricted by the seller. That law was carried forth within the United States, with state property laws uniformly disapproving so-called "chattel servitudes," attempts by sellers to introduce covenants and other restrictions running with personal property.

Intellectual property law followed the same path, denying sellers the ability to use intellectual property rights to restrain buyers from using or reselling their purchases. So well established is the first sale doctrine in copyright law that Justice Breyer deemed it to have "an impeccable historic pedigree." And product manufacturers have sought to use copyright law and a related anti-

circumvention of copyright protection statute as tools to prevent consumers from using sold products in ways undesirable to the manufacturers—but courts have uniformly resisted such efforts.

Unsurprisingly, this Court's long line of precedent on patent exhaustion has taken the same tack, refusing to admit any attempt to let patent law adulterate the traditional right of individuals to use and resell their possessions. The Federal Circuit's creation of exceptions to that traditional right thus conflicts with centuries of traditional property doctrines. Such "patent exceptionalism" is unwarranted and unnecessary, and this Court should grant certiorari to correct it.

2. The Federal Circuit's position on patent exhaustion is not merely deviant from the norms of law; it also is a serious impediment to consumer choice, free markets, competition, and individual liberty and autonomy.

The ordinary incidents of property ownership are critical to ensuring competitive markets and consumer rights. Secondary markets in goods permit efficient maximization of value, prevent price discrimination, and avoid waste by enabling reuse and recycling. Full ownership rights also include a right to repair, which opens up a valuable marketplace for repair services.

But ownership rights do not merely have economic value; they are essential to fundamental rights such as speech, autonomy, and privacy. Central to ownership are rights to understand, analyze, and innovate upon one's possessions. These rights take on special importance in an age where personal devices are increasingly complex and computer-driven, and yet whose inner workings are increasingly shielded from consumers' view. Reverse-engineering and tinkering are necessary to uncover flaws

and vulnerabilities in complicated devices, to protect users of those devices from undesired behavior such as spying, and to make devices simply work with others.

By creating an avenue for product sellers to undercut traditional rights and privileges of possessory ownership, the Federal Circuit severely undercuts these strong interests of consumers, of free market competition, and of individual liberty. This mistaken path of patent law further demonstrates the urgent need for this Court to address the Federal Circuit's decision.

3. The present case is an ideal vehicle for deciding these important questions of the patent exhaustion doctrine that implicate vast swaths of the public interest. The decision below affirmed two mechanisms by which a patent-owning seller of goods may circumvent exhaustion: first, by affixing a post-sale restriction to the product; and second, by selling the product abroad such that exhaustion does not apply. This case squarely presents facts that test the correctness of both of these exceptions to patent exhaustion.

At bottom, this case is not about specialized technical questions of patent doctrine, despite the specialist patent court's desire to make it so. This case is about the fundamental and traditional notions of personal property ownership. It is about whether vendors of goods may entangle, subdivide, and diminish those traditional ownership rights through devices of law, through encumbrances that run with chattels. This Court and others, for centuries, have disapproved such attempts to cut off the rights and liberties of owners and to stifle the free market. Nothing different should obtain with patent law. In this the Federal Circuit has erred, and certiorari should be granted to correct that critical error.

ARGUMENT

According to the doctrine of patent exhaustion, "the initial authorized sale of a patented item terminates all patent rights to that item." *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008); *accord United States v. Univis Lens Co.*, 316 U.S. 241, 250 (1942). Yet in the present case, the Court of Appeals affirmed two of its older precedents permitting exceptions to the doctrine: first, that a "conditional sale" overcomes exhaustion, *see Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708 (Fed. Cir. 1992); and second, that a foreign sale circumvents exhaustion, *see Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, 1105 (Fed. Cir. 2001). These exceptions to the exhaustion doctrine are incorrect and greatly damaging to the public interest for at least the following reasons.

I. THE FEDERAL CIRCUIT'S DECISION IS AN OUTLIER IN A CENTURIES-LONG TRADITION OF THE EXHAUSTIVE NATURE OF SALES OF GOODS

An increasingly common phenomenon at the Federal Circuit,[2] the rules of law announced in this case are lone patent-doctrine outliers divorced from a long history of law. Courts have consistently held that manufacturers and sellers of goods may not control use or resale of those goods once they become the personal property of buyers. That tradition ranges from early English law, to American state laws on personal property, to even recent decisions on other intellectual property regimes. This Court

[2] *Cf. Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014) (rejecting patent-specific declaratory judgment burden-shifting rule); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) (rejecting patent-specific injunction rule).

should grant certiorari to reverse the Federal Circuit's "patent exceptionalism," permitting sellers to do what numerous other areas of law prohibit.

A. For Four Centuries, Courts Have Rejected Post-Sale Restrictions that Run with Personal Property

As Justice Breyer wrote recently, the principle that sale of a good exhausts the seller of rights of control over the good is a principle of "impeccable historical pedigree." *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013). That principle derives from English common law four centuries old, and it has been widely embraced by American state law of personal property.

Perhaps the best known rejection of post-sale restraints was that of Sir Edward Coke, Lord Chief Justice,[3] who wrote that such restraints are void because they unnecessarily impinge on the free exchange of goods. Specifically, he found such restraints to be "against Trade and Traffique, and bargaining and contracting between man and man: and it is within the reason of our Author that [the initial sale] should ouster him of all power given to him." 1 Edward Coke, *Institutes of the Lawes of England* § 360, at 223 (1628).

Venerable doctrines of common law frown upon post-sale restrictions. The rule against perpetuities, the rule in *Shelley's case*, and the general common law rules

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[3]According to English practice, Edward Coke held the title of "Lord" only while on the bench, and accordingly would properly be styled "Sir Edward Coke" at the time of publication of his treatise. But American jurisprudence has conventionally used the appellation "Lord Coke," and so that convention is followed subsequently in this brief.

against restraints on alienation of real property all reflect a general aversion of the law toward attempts by property sellers to maintain a dead hand of control after the sale. *See* George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19, 20, 31 n.40 (1977). Also illustrative is the English case *Taddy & Co. v. Sterious & Co.*, in which a tobacco manufacturer tried to set minimum retail prices for its products. *See* [1904] 1 Ch. 354, 357–58 (1903) (U.K.), *available at* URL *supra* p. vi. The High Court rejected that attempt, holding that "[c]onditions of this kind do not run with goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the Court can enforce." *Id.* at 358.

American courts followed in this tradition of refusing to enforce post-sale conditions as running with the goods sold. *John D. Park & Sons Co. v. Hartman*, in rejecting a minimum resale price restriction, explained:

> It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel.

153 F. 24, 39 (6th Cir. 1907); *see also Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404 (1911) ("Thus, a general restraint upon alienation is ordinarily invalid."); *Garst v. Hall & Lyon Co.*, 61 N.E. 219, 219 (Mass. 1901) ("The purchaser from a purchaser has an absolute right to dispose of the property."); *W.H. Hill Co. v. Gray &*

Worcester, 127 N.W. 803, 807 (Mich. 1910) ("[R]estraints upon alienation have been generally regarded as obnoxious to public policy.").

Post-sale restraints on use and alienability of property have thus been "greeted with judicial hostility" by common law courts over the span of four centuries. Molly Shaffer Van Houweling, *The New Servitudes*, 96 Geo. L.J. 885, 888 (2007). The Federal Circuit's welcoming of such restraints through exceptions to the patent exhaustion doctrine thus directly conflict with this common law tradition.

B. Courts Refuse to Use Intellectual Property Doctrine to Enforce Post-Sale Restraints

Perhaps intellectual property rights might have offered a different path for enforcement of post-sale restraints, but the case law proves otherwise, with courts applying the same principles of unfettered ownership rights over physical goods even when those goods are covered by intellectual property. Thus, the Federal Circuit's exception-ridden conception of patent exhaustion is an outlier not just among legal doctrines generally, but also among intellectual property laws specifically.

1. The copyright first sale doctrine is a direct corollary to the common law rejection of post-sale restraints. In an early statement of that doctrine, this Court echoed the personal property law cases cited above when stating that "one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908); *see* 17 U.S.C. § 109(a) (codifying first sale doctrine). This Court's more recent statement of the first sale doctrine

in *Kirtsaeng* specifically quotes Lord Coke on "the importance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of those goods." 133 S. Ct. at 1363. Thus, the first sale doctrine of copyright is inextricably tied with the common law view against post-sale restraints. *See* Van Houweling, *supra*, at 910–11.

The copyright first sale doctrine demonstrates that courts do not treat owner rights in physical goods any differently even when those physical goods are covered by intellectual property rights. While the right to make new items does not fall under traditional bundle of property rights and thus is subject to intellectual property enforcement, *cf. Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1766 (2013), the right to use and resell the physical item bought and owned cannot be attenuated, through copyright or otherwise.

Indeed, courts have refused to enforce copyright-based post-sale conditions on personal property, even where violation of the conditions requires violation of the exclusive right of copying that is squarely within the scope of copyright infringement. Manufacturers sometimes embed "lock-out codes" in product components (such as toner cartridges). When those components are installed into the main product (such as a laser printer) the main product queries the components for the lock-out code, and the product will refuse to operate absent a correct code. *See* Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock-Out" Programs*, 68 S. Cal. L. Rev. 1091, 1094–95 (1995).

Third-party makers of compatible components then install the lock-out code in their components to ensure

that the main product will operate, and in several cases the original manufacturer has sued those third-party component makers on the theory that the lock-out code is copyrighted. *See id.* at 1095.

This copyright infringement theory has been uniformly rejected as an improper application of copyright law to stop consumer choice in physical goods. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.* ("*Static Control*"), 387 F.3d 522, 536 (6th Cir. 2004) (code sequence required to operate product held uncopyrightable); *see also Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 & n.7 (9th Cir. 1992) (incorporation of unlocking code into came console cartridge deemed fair use); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 840 (Fed. Cir. 1992) (no clear error in district court's conclusion that "the generation of a data stream to unlock a console" was unprotectable idea or process).[4] The purpose of copyright is to promote creation, not to crush competition in consumer goods, and courts have refused to permit copyright to be used to such ends.

2. Courts refuse to enforce post-sale restraints on goods under a second intellectual property doctrine. The anti-circumvention provisions of § 1201 of the Digital Millennium Copyright Act (DMCA) generally proscribe attempts to circumvent effective technological measures that protect access to copyrighted works, and courts have repeatedly said that those proscriptions are not to be used purely for exerting future control over goods absent a substantial intellectual property interest nexus.

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[4]While *Atari* ultimately found that copyright infringement had occurred, the infringement was copying of computer code that *generated* the unlocking code, not copying of the unlocking code itself, and the Court found that there were multiple ways that the computer code could have been implemented. *See* 975 F.2d at 840.

In *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, a garage door opener manufacturer claimed that a maker of competing and compatible garage opener transmitters had violated § 1201 because the competing transmitters had circumvented a technological measure, namely an encrypted garage door opening signal. *See* 381 F.3d 1178, 1185 (Fed. Cir. 2004). But *Chamberlain* rejected this § 1201 theory, because the manufacturer had failed to show injury to underlying intellectual property rights, and rather asserted § 1201 purely to prevent competition in its consumer products. *See id.* at 1201.

The Court of Appeals refused to read that statute to allow a manufacturer "to restrict consumers' rights to use its products in conjunction with competing products." *Id.* To hold otherwise "would allow virtually any company to attempt to leverage its sales into aftermarket monopolies—a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit." *Id.* (citations omitted). *Chamberlain* thus held that intellectual property protection could not be wielded as a sword to cut off consumer aftermarket decisions.

Other decisions are in accord, refusing to enforce what would amount to contractual breaches as violations of § 1201. *See, e.g., Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1319 (Fed. Cir. 2005) (misuse of software may violate contractual rights, "but those rights are not the rights protected by copyright law"); *Static Control*, 387 F.3d at 546–47 (refusing to find a violation of § 1201 where a computer chip manufacturer circumvented technological protection measures in order to refill printer ink cartridges).

Accordingly, with respect to both copyright law and § 1201 of the DMCA, courts consistently refuse to let

intellectual property law transmogrify into a post-sale lever of control over consumer products. This Court should similarly refuse to turn patent law into such an undue and anticompetitive mechanism for manufacturers.

C. Patent Exhaustion Has Adhered to This Long Tradition of Precedent—Until the Federal Circuit

Given this weight of precedent of both common law and intellectual property law disfavoring post-sale restraints on ownership rights, it is unsurprising that this Court has consistently held that patent law too may not be used to enforce such restraints. It is only when the Federal Circuit began developing doctrine that the general principles of ownership rights were breached.

In one of the earliest cases to enunciate the patent exhaustion doctrine, *Adams v. Burke* refused to enforce a territorial restriction on a purchaser of patented coffin lids. 84 U.S. (17 Wall.) 453, 458–59 (1873). Once the patentee has sold a patented article to a purchaser, said this Court, the article "is open to the use of the purchaser without further restriction on account of the monopoly of the patentees." *Id.* at 456.

Keeler v. Standard Folding Bed Co. similarly found it "obvious that a purchaser can use the article" and "can sell or dispose of the same," 157 U.S. 659, 661 (1895), finding that "[t]he inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration," *id.* at 667. *See also Bauer & Cie v. O'Donnell*, 229 U.S. 1, 17 (1913); *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490, 501 (1917). Although *Henry v. A.B. Dick Co.* did suggest that a condition upon sale of a patented article could avoid exhaustion, *see* 224

U.S. 1, 24–25 (1912), this Court quickly corrected that misstep, overruling *A.B. Dick* in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502, 518 (1917). Restraints on the use or resale of personal property were not enforcible, even through the device of patent law.

This Court's precedents thus "reflect a special skepticism about chattel servitudes that applies even when the chattel at issue embodies an intangible work subject to intellectual property protection." Van Houweling, *supra*, at 914. It was nothing less than patent exceptionalism for the Federal Circuit, decades later and in the face of these controlling precedents, to reverse course and suggest that patent law can admit exceptions to the exhaustion doctrine that enable exactly those chattel servitudes. Certiorari should be granted to eliminate this discrepancy between patent doctrine and all other law.

II. The Decision Below Impairs Strong Consumer and Free Market Interests

If allowed to stand, the Federal Circuit's twin holdings in this case will provide a roadmap for how companies can use patent law to avoid exhaustion. While other areas of the law—such as copyright's first sale and the anti-circumvention jurisprudence discussed above—provide for a robust exhaustion doctrine, the Federal Circuit has allowed patent law to become a marked outlier. This will push companies toward patent law as the best tool to frustrate consumer autonomy and market competition.

The exhaustion issues raised by this case are even more significant because patent law has a growing impact on the market for standard consumer goods. In recent

years, the USPTO has granted increasingly large numbers of software patents. *See* James Bessen, *A Generation of Software Patents*, 18 B.U. J. Sci. & Tech. L. 241, 252–53 (2009). During the same period, more and more consumer goods are shipped with embedded software—common goods like refrigerators, blenders, thermostats, and cars. *See* Dave Evans, Cisco Internet Bus. Solutions Group, *The Internet of Things: How the Next Evolution of the Internet Is Changing Everything* 3 (2011), URL *supra* p. vii (estimating that 50 billion devices will be connected to the Internet by 2020). Standard consumer goods that were, until recently, likely to be protected by few if any patents may now implicate numerous software patents. The Federal Circuit's holding, left unchecked, will thus provide a staggering range of companies with the power to end-run around the protections of the exhaustion doctrine.

A. Weakening Patent Exhaustion Will Harm Competition and Consumers

Patent exhaustion advances full ownership rights for consumers and promotes market competition. Specifically, exhaustion reduces information costs in buying and selling goods, protects competition in the market for service and repair of goods, and avoids monopolistic pricing behaviors.

1. The Federal Circuit's cramped view of patent exhaustion imperils vibrant secondary markets. A purchaser of a product will not always know whether any patentee has placed a post-sale restriction on the product that impairs the purchaser's right to use or later alienate that product. If that restriction is enforceable through patent law, then second, third, and further purchasers

are all substantially burdened with the administrative cost of inquiring about such restrictions, or risking infringement liability absent such inquiry or in the event of a mistaken assessment. *See Kirtsaeng*, 133 S. Ct. at 1363; Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, 896–97 (2011). Indeed, the complexity and remoteness of post-sale restrictions presents an unnecessary layer of information asymmetry upon even the initial purchaser of the encumbered product. *See* Van Houweling, *supra*, at 921.

In part by eliminating those unnecessary administrative costs on purchasers, patent exhaustion allows for consumer-beneficial secondary markets. Companies like eBay and Craigslist offer consumers highly efficient secondary markets for an unprecedented variety of goods. Other secondary markets are supported by intermediaries ranging from specialized resellers and refurbishers, to general second-hand stores such as Goodwill. *See* Kyle Wiens, *One Way to Create American Jobs: Fix Our 5 Million Tons of Out-of-Use Electronics*, The Atlantic (Oct. 31, 2012), URL *supra* p. ix.

Secondary markets offer numerous social and economic benefits to consumers, such as placing lower-cost used goods on the market, allowing purchasers to recoup some of their purchase cost at market rates, and protecting the environment by enabling reuse and recycling. *See* Zachariah Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 Harv. L. Rev. 1250, 1261 (1956) (describing "policy in favor of mobility" long embraced by personal property law). Without the patent exhaustion doctrine, however, manufacturers would be free to terminate secondary markets by mere conditions upon sale.

2. The Federal Circuit's holdings in this case also threaten competition within the repair market. This Court's precedents have long held that repair activities short of reconstruction fall outside the scope of the patent right. *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 342–43 (1961). The Federal Circuit's holdings on exhaustion jeopardize independent product refurbishers and repair services, who could now find themselves liable for patent infringement for performing what ought to be lawful repair activity.

A thriving independent repair market creates many benefits. As anyone who has ever sought automotive repair services is well aware, consumers are better off with a wide array of competing providers of post-sale service and repair. Indeed, a recent study suggested that consumers can cut their car repair bills by an average of about $300 a year, or 25%, by going independent. *See* Jonathan Welsh, *Is the Dealer Better Than an Independent Mechanic?*, Wall St. J. (May 17, 2010), URL *supra* p. ix. The repair industry also supports local employment and helps reduce electronic waste. *See* Jenna Wortham, *How to Fix Your iPhone (the Unofficial Edition)*, N.Y. Times, Apr. 14, 2010, at B9, *available at* URL *supra* p. ix; Victor Luckerson, *We've Spent Almost $6 Billion on iPhone Repairs Since 2007*, TIME.com (Sept. 20, 2012), URL *supra* p. viii.

3. Additionally, the Federal Circuit's decision encourages inefficient forms of price discrimination that will harm consumers. Many, perhaps most, post-sale use restrictions imposed by patent holders will be designed to facilitate price discrimination. Field-of-use and single-use restrictions, for example, are often used to charge different prices to different groups of customers, while

preventing them from engaging in arbitrage. *See* Mark R. Patterson, *Contractual Expansion of the Scope of Patent Infringement Through Field-of-Use Licensing*, 49 Wm. & Mary L. Rev. 157, 159–60 (2007). Similarly, Lexmark had the opportunity to receive full and just compensation for its sales outside the United States and its attempt to get a second bite at the patent royalty apple upon importation of the sold product is a consumer-detrimental attempt at price discrimination.

All patents grant some power to price discriminate. But patent exhaustion has always served as a check on that power, and the Federal Circuit's diminishing of exhaustion permits an unwarranted expansion of that price discrimination power. Besides representing a pure windfall to manufacturers at the expense of consumer dollars, price discrimination can be the basis of anticompetitive acts, as antitrust laws recognize. *See* Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (2012); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 219–20 (1993). At the very least, given the world-wide impact of the Federal Circuit's holdings, the case warrants certiorari so that this Court can carefully consider these issues.

B. Patent Exhaustion Protects Fundamental Speech, Autonomy, and Privacy Rights of Purchasers

Product manufacturers have routinely attempted to expand their rights under intellectual property law to restrict the spread of information about their products and to prevent customers from using their devices in new and useful ways. The Court should ensure that patent law does not provide a roadmap to legitimize such practices.

If patent owners can attach conditions to the sale of patented products, manufacturers will likely use this option to widely prohibit lawful activities such as reverse engineering and adaptation of mass-market devices and software. Manufacturers like Lexmark have attempted to impose a variety of post-sale restrictions on the use of their products.

Contracts of adhesion such as "Terms of Use" or "End User License Agreements" illustrate the "wish list" of sellers. These "agreements" regularly disallow product owners to:

- Discuss "any performance or functional evaluation" of the product without manufacturer approval. Nest End User License Agreement *infra* p. 1a.

- Reverse engineer, for example to research functional elements or to create interoperable software and hardware. *See* Apple WatchOS Software License Agreement *infra* p. 3a.

- "[T]ransfer, assign, or sublicense [their] license rights to any other person or entity," that is, resell second-hand. *See* Cisco End User License Agreement *infra* p. 4a.

- Use non-approved software or hardware in conjunction with the device, such as third-party hardware competing with the seller's own peripherals, or privacy-protecting software. *See* Cory Doctorow, *Windows 10 EULA: Microsoft Can Killswitch Your Unauthorized Hardware and Pirate Games*, Boing Boing (Aug. 20, 2015), URL *supra* p. vii; Pulser_G2, *Protecting Your Privacy: App Ops, Privacy Guard,*

and XPrivacy, xda-developers (June 11, 2014), URL *supra* p. viii.

- Refuse future changes to the terms of service—in one case, the manufacturer disabled further operation of devices until the user agreed to amended terms. *See* Kit Walsh, *Nintendo Updates Take Wii U Hostage Until You "Agree" to New Legal Terms*, Electronic Frontier Found. (Oct. 13, 2014), URL *supra* p. ix.

- Modify software on the device, even in ways that infringe no intellectual property right. *See* Fitbit Terms of Service *infra* p. 5a.

- Lawfully circumvent technological protection measures restricting access to copyrighted works (such as circumvention for accessibility or interoperability). *See* Playstation Software License Agreement *infra* p. 7a.

These important activities are all otherwise lawful, but are likely targets if this Court were to leave intact the Federal Circuit's grant to patent holders of a mechanism to strip customers of their rights via the conditional sale of patented goods.

Reverse engineering is essential for device owners and consumer protection watchdogs who want to determine whether devices are trustworthy. Reverse engineering has investigated important product safety and consumer rights issues, such as security of insulin pumps, unsolicited data collection by smart TVs, fabrication of car emissions test results, and life-threatening defects in car acceleration. *See* Tammy Leitner & Lisa Capitanini, *Medical Devices Vulnerable to Hack Attacks*, NBC Chi.

(Sept. 29, 2014), URL *supra* p. viii; Javier E. David, *Shhh, Not in Front of the TV! Samsung May Be Eavesdropping on You*, CNBC (Feb. 8, 2015), URL *supra* p. vii; Karl Russell et al., *How Volkswagen Is Grappling with Its Diesel Deception*, N.Y. Times (Mar. 24, 2016), URL *supra* p. ix; Brian Ross et al., *Toyota to Pay $1.2B for Hiding Deadly "Unintended Acceleration"*, ABC News (Mar. 19, 2014), URL *supra* p. viii.

Similarly, customers often wish to customize and improve upon the software and hardware components of their devices. This includes patching security vulnerabilities, blocking invasive collection of personal data, installing new software, or attaching new hardware (such as sensors, additional memory, or more durable components). These practices are lawful by virtue of exhaustion and related doctrines, such as copyright law's fair use and rights recognized by 17 U.S.C. § 117 (adaptation of computer programs) and § 1201(f)–(j) (exemptions to ban on circumvention).

Product sellers understandably want to control the information available about their products and to maximize profit by controlling customers' behavior, but the law of intellectual property wisely has not given them such control. Indeed, it would be inconsistent with free speech ideals and the goals of intellectual property law to grant sellers the power to restrict speech about such facts and ideas. Beyond the speech considerations, ordinary people would risk losing the autonomy to audit and control their personal property to make it serve them rather than acting as a continuing agent for the seller after sale.

Certainly manufacturers may use contracts to bind consumers with whom they have privity, up to the ordinary limits of contract law (but no further, *see, e.g.*,

Phila. Indem. Ins. Co. v. Barerra, 21 P.3d 395, 402 (Ariz. 2001) (unconscionability and reasonable expectation doctrines); *Perricone v. Perricone*, 972 A.2d 666, 682–83 (Conn. 2009) (public policy limits in contractual waiver of speech rights)). But contract limits do not run with the property; they do not bind successive owners. Contracts thus do not present the competition and consumer harms presented by an unshakable post-sale condition tied to the physical article.

The law should not grant patent-owning sellers a legal vehicle to unilaterally override the rights of purchasers. The Court should grant certiorari so that the judgment of the Federal Circuit can be reversed.

III. This Case Squarely Presents Two Questions on Patent Exhaustion, Both Worthy of This Court's Review

The dissonance between the Federal Circuit's decision and the aforementioned precedents and concerns is eminently reviewable in the present case. The underlying facts squarely present two areas in which the Federal Circuit has erroneously limited the doctrine of patent exhaustion. Those questions presented both precisely test all of the problems of law and policy identified in this brief. A grant of certiorari would be highly appropriate.

A limited set of facts is sufficient to be determinative of this case, as the parties have already agreed. Pet. Cert. 9a. Respondent Lexmark International, Inc. is a manufacturer of printers and accompanying toner cartridges used in those printers, selling those cartridges to consumers. *Id.* at 9–10a. Petitioner Impression Products, Inc. acquired from consumers certain toner cartridges,

lawfully manufactured and sold by Lexmark, and Impression refilled and resold those cartridges. *Id.* at 10a.

Lexmark owns patents on its toner cartridges[5] and contends that Impression infringes based on the remanufactured cartridges. Ordinarily, because the cartridges were originally sold by Lexmark, the doctrine of patent exhaustion would apply, and no infringement cause of action would lie. So Lexmark relies on two exceptions to the patent exhaustion doctrine that the Federal Circuit has created, each of which corresponds to one of the questions presented.

First, Lexmark sold the printer toner cartridges to consumers under a restriction that the buyer may not resell the cartridge to anyone other than Lexmark. *Id.* at 10–11a. That raises the first question presented, namely whether a conditional sale with post-sale restrictions can circumvent the patent exhaustion doctrine, thereby allowing Lexmark to proceed with its patent infringement claim. *Id.* at 10a. Second, Lexmark sold some of the toner cartridges abroad, and Impression acquired them for resale in the United States. This raises the second question of whether an authorized sale of a patent article will fail to invoke the patent exhaustion doctrine if the article is sold outside the United States.

The success of Lexmark's patent infringement case thus turns directly on whether or not there should exist these two exceptions to the patent exhaustion doctrine, both invented by the Federal Circuit. The questions presented in Impression's petition squarely ask whether those two exceptions should exist.

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[5]The patents are apparently so inconsequential to this case that neither the Federal Circuit's opinion nor Impression's petition identifies the relevant patent numbers.

And it is these two exceptions to patent exhaustion that give rise to the serious problems described in this brief. It is the circumventability of the patent exhaustion doctrine, through post-sale restrictions or out-of-country sales, that is at odds with the long history of law refusing conditions and servitudes on sales of goods. And it is that circumventability that impinges on the consumer interest, on individual liberties to use and enjoy personal property, and on the free market in secondhand goods.

The time is ripe to address these twin errors of the Federal Circuit that fundamentally undermine the important doctrine of patent exhaustion. This Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 2016

APPENDIX A
EXAMPLE END USER LICENSE AGREEMENTS

The following are excerpts from certain end-user license agreements obtained on the Internet on April 18, 2016.

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https://nest.com/legal/eula/

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